ADDENDUM A

Motion Hearing Transcript

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. WARREN STEED JEFFS. Defendant.	CASE NO. 061500526

BEFORE THE HONORABLE JAMES L. SHUMATE

FIFTH DISTRICT COURT

220 NORTH 200 EAST

ST. GEORGE, UTAH 84770

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTIONS HEARING

MARCH 27, 2007

REPORTED BY: Russel D. Morgan

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E X H I B I T S

PAGE NO.

I N D E X

March 27, 2007. St. George, Utah.

PROCEEDINGS

THE COURT: Good morning, ladies and gentlemen. The record will reflect that it is the 27th of March, 2007, 9 o'clock in the morning. Matter before the court is State of Utah vs. Warren Steed Jeffs. Mr. Jeffs is present together with his counsel.

We have three motions on to be heard this morning. Mr. Bugden, for the defense, and Mr. Belnap for the state, gentlemen, I would suggest that we address first the motion regarding the constitutionality of the statute in question, next, the bindover. Then, as we discussed in a telephone conference, this afternoon address the motion for change of venue. What do you think about that order? Mr. Bugden, you are the moving party, so what do you think about that?

MR. BUGDEN: That's fine.

THE COURT: All right. Counsel, I have everything in front of me. I have both of your briefs. I have the courtesy copies that you so kindly gave me that I have been carrying around for quite a while to look at. Let's go to the motion to declare 76-5-406 (11), unconstitutionally vague. Mr. Bugden, the floor is yours.

MR. BUGDEN: Mr. Wright is going to argue that.

THE COURT: All right. Mr. Wright. Thank you, counsel.

MR. BUGDEN: May I just inquire, did you receive last week, maybe yesterday, some additional articles?

THE COURT: I did counsel. They are here on the desk with me. However, I have treated those as my personal copies, as courtesy copies. Should I have those included in the record or have you made effort to make sure it's in the record?

MR. BUGDEN: No, I think that what I have sent you will have to ultimately go into the record.

THE COURT: All right. Then, we will receive these when we do that motion, counsel. Mr. Wright, go ahead, counsel.

MR. WRIGHT: As the court's aware from the brief that was filed, we contend that the nonconsent statute which makes enticement of a teenager to engage in sexual contact with an adult, non-consentual as a matter of law, is void for vagueness because of the broad interpretation given to enticement by the Utah courts and leaving the determination as to who should be prosecuted and/or convicted to the whim of a jury whenever someone fits within that class.

THE COURT: Counsel, let me stop you right there and make sure I'm firmly focused on what you have just told me. It is your position that Utah courts, appellate courts addressing the definition of enticement, what does enticement mean under this section of the code, have drawn it so broadly

that it leaves an individual citizen completely in the dark as to what conduct may or may not be unlawful? Is that really what you are telling me?

MR. WRIGHT: Yes, sir.

THE COURT: All right. Now, the general rule of statutory construction would have us use common sense and commonly used definitional processes in order to define terms that are not specifically defined within a statute. "Enticement" is -- or "entice" is not defined within our statute. And I think we all agree with that, that the law is fairly clear. The word is used without definition within the statute.

It's your position, defense position, that if I go to the definitions used by appellate courts and use that as the guide for prosecutions, that a law enforcement officer or prosecuting agency could pick any number of otherwise apparently harmless conduct and make a criminal case out of it?

MR. WRIGHT: Yes, sir.

THE COURT: Okay. We, of course, have specific facts here. But let's talk about the frailties in that definition, then, as you see it. How is it that you see that the breadth of that definition gives us some pause at the guidance that it tries to give to law enforcement? Tell me about it.

MR. WRIGHT: Okay. And, also as the court's aware,

the first prong would be the lack of notice to the accused, aside from the standards for law.

THE COURT: That's why it would be flawed under a due process standard?

MR. WRIGHT: Yes, sir. If we go to the cases, the two Utah appellate court cases, which use dictionary definitions of "enticement," I can get 19 different definitions out of Gibson. And I don't know how to pronounce the case you presided over. S-c -- State vs. Scieszka?

THE COURT: Scieszka.

MR. WRIGHT: Scieszka.

THE COURT: Scieszka. Probably does damage to those folks that speak that language, but I think it is Scieszka.

MR. WRIGHT: Okay. In Zesca, then in Gibson within six months thereafter, the appellate court said that "entice," obviously, means going to Black's Dictionary and common dictionaries, lure, tempt, induce, insight, persuade, solicit, procure, allure, attract, coax, seduce, trap, snare, entangle, decoy, delewd, instigate, lead astray, lead on by hope of reward or pleasure, or draw by blandishment. So, any conduct of the adult which can be said to insight, instigate or lead astray a teenager to conceptually engage in a sexual act leaves a person open to prosecution. And when you use words like insight or instigate or taking the lead, which was Judge Orme's definition in his concurring opinion --

THE COURT: The "e" isn't pronounced. It's just Orme.

MR. WRIGHT: Orme.

THE COURT: Yeah. I know him. That's okay.

MR. WRIGHT: Judge Orme -- it leads, as Judge Orme pointed out, almost any adult with appropriate age classification, dealing with a sexual act in which a teenager participates, subject to prosecution.

THE COURT: Well, counsel, it gives me an interesting analytical problem that your help will be greatly useful to me. Part of the reason I can see behind the legislature using a word like "entice" is the fact of the great disparity between adults and teenagers, especially teenagers 14 years of age as we have in this particular case. Teenagers have little, if any, judgment; otherwise, they would never leave home. They are subject to whim in many ways in their personal decision making processes. And because of that fact, I think the legislature knowing that, wanted to put an extra guard rail, if you will, around persons of that age. And I can see that reasoning floating into as many different terms as you have given me. I'm not so much worried about "incite." We have had incite to riot on the books for many, many years. And we know what "incite" means. But some of these others, "to lead," as you have given us, is a little bit hazy. But how is that -- any one of those terms that you

have quoted me from Scieszka, how is any one of those susceptible of being innocently used by a person when the basic interaction between actor and prosecutrix is the objective of sexual contact? Knowing that the sexual contact is what is verboten, what is forbidden, how is it that anything that is done with a 14 year-old young woman done innocently when that seems to be the outside objective, the main objective? Don't I have to put the two of them together in order to make sense of this? It's just troubling to me to know what 14 year-olds are like, know what the legislature is dealing with, and to then find that this use of this term is violative of due process. Can you give me some thought on that combined analytical task that we have before us?

MR. WRIGHT: Yes. The goals of the legislature are proper and laudable and beyond dispute. Protect an immature, innocent, inexperienced teenager from an older adult during these formative years. The question is how to define it so that there is adequate notice and to prevent arbitrary discriminatory selection in the prosecution of the transgressor. And that's where I have the problem, because if the legislature would simply say, which they almost have, we are not going to allow teenagers to engage in sexual conduct if the partner is more than three years a senior. Just a blanket prohibition like for under 14 year-olds in Utah, that would be a bright line and wouldn't leave the

discretion to the prosecutor and then, ultimately, to a jury to decide whether they liked the person or not and the conduct. But here, the way the nonconsent statute is written, it allows even an act where a 21 year-old falls in love with a 17 year-old and says I love you, and they do love each other, and they engage in a sexual act in which she consensually participates. If she says she was induced into this, or led into it by his love, that is an offense under this statute.

THE COURT: Counsel, we do have a category of offense, third degree felony, improper sexual activity with a minor that I have seen prosecutors use very often in that kind of setting. The consensual were madly in love. We don't want to get married, we just want to be in love. And, as a consequence, there is a third degree felony arising out of that. Your concern is that a zealous prosecutor can take that circumstance and, based upon the promises and devotion and sincere desires of the older actor, take that from a third degree felony and ratchet it all the way up to a first degree felony.

MR. WRIGHT: Correct. It would fit the definition. And because the way "entice" is defined, it doesn't require a falsity like in Raggle (phonetic), you know, I love you, wink, wink, but I really don't. The enticement can be genuine true love and caring by the adult or the teenager.

And that is still covered by the statute. Even if the teenager otherwise consents in all manifestations, legally, it is an unrecognized consent because of the age disparity. And so, then you leave the prosecutor to decide, in exercising my discretion, am I going to go with the third degree, the peashooter, or am I going with the nuclear warhead prosecution and charging it as rape? And --

THE COURT: Counsel, let's take your client's setting, which is different than the one-on-one setting. And I still understand the need that the one-on-one setting is necessary because Mr. Jeffs is being prosecuted as an accomplice. But let's take someone else in a circumstance that I can imagine not very difficultly where the older child, and I'll say child only in the sense that this person is 19 years of age, is driving a car. The 14 year-old is waiting outside her middle school. And the driver says, come on, let's go to a party. You'll have a good time. If the party is set up simply to do, as often teenage parties are, to get people together, probably drink beer or anything else that's available, or some other chemical inducement to abandon one's inhibitions, it's your position that the driver, not knowing what's going to happen at the party, is subject to the first degree felony prosecution just by saying, Come on, you'll have a good time, that's all the enticement that you need. And --

MR. WRIGHT: Certainly.

THE COURT: And a third-party actor at the party commits an act of rape under those circumstances. And it's your position that Mr. Jeffs is the driver of the car.

MR. WRIGHT: Certainly. That is the conduct which enticed the ultimate union of the two people --

THE COURT: Okay.

MR. WRIGHT: -- by which the driver was a participant, participating.

THE COURT: All right. Now, let's get to the constitutional setting here because, if I rule on this matter constitutionally, I am saying as a matter of law that under the facts of this case as I have it, as best I can apply this statutory language and the definitions given to me by the dictionary sources through the appellate courts, I can not place someone in Mr. Jeffs' position on proper notice and accord them due process under the U.S. and Utah Constitutions because someone in his position could not or would not be able to tell that their activity would in fact be unlawful and, therefore, I must find the statute unconstitutional?

MR. WRIGHT: Yes, sir.

THE COURT: But, in our facts, counsel, in our facts, it wasn't just, come on, let's ride to a party. In our facts, it was, you need to marry this man. You need to engage yourself in a ceremonial act which will, in our

community, constitute a marriage relationship. And you are, as a consequence of that act, to have children. And as I have said previously, absent medical intervention, that would imply an act of sexual intercourse. That's the facts that we have here. That's the objective that was had here as was testified to in the preliminary hearing. How can I rule that that, as a matter of law, is not properly warned against with the language of this statute? I would have a whole lot easier time if it was just given a ride.

MR. WRIGHT: Well, a Catholic priest marries a 21 year-old and a 17 year-old and says, you shall get married, go forth -- he reads the old testament. Then they go get married and happily have intercourse. As a matter of law, if they are, if both of them, if they are having the intercourse, if they are consummating the marriage in a sexual act because of the blessing of the priest, then they are married, that was the instigation that made it occur. The priest committed the offense if we use --

THE COURT: What if the bride says I don't want to? What if the bride says no?

MR. WRIGHT: To whom? The husband?

THE COURT: To the priest.

MR. WRIGHT: To the priest?

THE COURT: Yeah. Right there to the priest. Right at the alter makes quite a scene in the church, I'm sure.

But what if that's the comment made?

MR. WRIGHT: And he goes ahead and performs a marriage?

THE COURT: Um-hmm.

MR. WRIGHT: He may be thinking, I'm marrying someone against their will in violation of some statute. Would the priest be thinking I'm going to be prosecuted because ultimate consensual sex would be nonconsensual as a matter of law because I performed a marriage act? I don't see the priest being on notice of that. I can see him being on notice of some other thing, like, willfully marrying an underage person. But when you take the big offense and define it so broadly and inconclusively that it allows the prosecutor to go after the particular priest more aggressively than anyone else, even more than the husband who allegedly committed the act, that is the type of arbitrary enforcement that is disallowed, in my judgment.

THE COURT: All right. Do we have anywhere in the nation a court addressing the use of this term "enticement" as it pertains to a criminal violation where that court has said, you know, you throw enticement into the statute and it just becomes overly broad? Have we got any authority out there that you can cite me to, counsel?

MR. WRIGHT: I'm not aware of a case in which a void for vagueness succeeded based upon the definition of the word

"enticement."

THE COURT: All right. So, we would be plowing new ground if we did this.

MR. WRIGHT: Well, it's ground that's never been plowed. So, yeah, plowing new ground. I mean, the issue hasn't been addressed in either of those two Utah appellate courts dealing with enticement.

THE COURT: All right.

MR. WRIGHT: I mean, it really wasn't addressed as a void-for-vagueness. And a definition wasn't even required in the Gibson case. But my problem in this case is the second part, even more so than the notice, the allowing of the arbitrary enforcement by prosecutors who want to follow their own predilection in not condoning the practices of, for example, the Catholic priest, and selecting this case, no other case. I mean, I'm not aware of any case in Utah in which a prosecution has been had as an accomplice statute for the religious person who officiated and counseled when thereafter the marriage was consummated and there was sexual act. I'm aware of no other prosecution, not in this state, or any state for that matter. Yet, to go after -- and, of course, this theory of prosecution would occur even if the alleged victim in this case and her husband were still happily married. If the cohabitation, the getting together sexually resulted from this marriage. I mean, because it

would be a lack of consent as a matter of law under the statute if the person who performed the ceremonies carried out the religious beliefs of these people, if that's what caused it to occur, because it's almost a "but for" analysis when you read Gibson. I mean, but for the conduct of this person, that forbidden act would not have occurred. And that is too broad of a criminal brush to paint and then only to allow the prosecutor to go after the religious leader and ignore every other religious leader and the actual husband who allegedly performed the act. To me it is -- it is plain and simple arbitrary enforcement. It's almost in Kolender, it says, quoting from Reece, in Kolender vs. Lawson, a supreme court case, "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."

Just put into that, rather than the court, leave it to the prosecutor to determine which individual in which religion are we going to go after and not prosecute anyone else for similar conduct.

THE COURT: Counsel, I did not want to lead you away from what may have been another proper argument. And I want to give you an opportunity to address this. You cite the Hialeah case, U.S. Supreme Court matter, because of its

impact upon religious practice. If you want to tell me something about it specifically from that standpoint. Again, it's your motion. I'll let you tell me about it. Anything else you want to tell me about it from that standpoint?

MR. WRIGHT: No, sir.

THE COURT: That covers it?

MR. WRIGHT: I think, obviously, you have read everything and are well prepared. And you went right to the crux of the issue more quickly than I would have got there. So, I expressed exactly what our concern is on the vagueness which allows over, overbreadth, almost, which allows a prosecutor to select, I will go after this particular offense. And then, going to be sitting in front of a jury, leaving them to decide with 16 or 19 different definitions, is this defendant -- do we find his conduct distasteful enough to fit within any of these. And it's almost to me like the, one of the supreme court cases in which the fellow was wearing an American flag on the seat of his pants. And they found vagueness in this flag in the contempt statute because it allowed the jury to make the determination. And it was pointed out or conceded at argument of the case that if it was an antiwar protestor who acted contemptuously after a rally and used the flag to cover up from rain, a jury could easily convict, but if a VFW member just leaving a pro war rally had done the same conduct, a jury would not convict.

And it -- under the statute, there was no guideline that allowed them to make this distinction.

THE COURT: All right, counsel. I'll give you a chance for rebuttal, but I'll hear from the state next. Thank you, Mr. Wright. Mr. Belnap.

MR. BELNAP: Your Honor, I would like to introduce Craig Barlow, who is from the attorney general's office. Craig joined our team. And Craig's going to be handling the void-for-vagueness argument.

THE COURT: All right. Mr. Barlow, the floor is yours, counsel.

MR. BARLOW: Thank you.

MR. BUGDEN: Mr. Barlow, before you begin --

I don't know if there is anything we can do about this, but we were handed a note, Your Honor, that indicated that the folks in the cry room aren't able to hear any of the arguments. I don't know if we can move any of the microphones so it's going to apply to Mr. Barlow as well as all of what Mr. Wright --

THE COURT: The problem that we have, counsel, is that the podium is not miked. If I want to have counsel heard in the cry room, I'll have to make counsel stand behind the table. And, in all candor to both of you good gentlemen, I couldn't practice law in my own courtroom. The way I practiced law, I moved around a lot. And being tied to that

microphone is a terrible impediment to the way I used to work. But I'm not so concerned about that. Because of all the efforts that we are making for dissemination and extra tape copies, I'll allow you to work where you want to work from. We could pull the podium back, but this courtroom's not really useful enough for that. And I'll give you gentlemen full discretion as to where you want to be. If you would like to pull that mic over there --

MR. BUGDEN: If this was sitting near his podium, are they going to hear it back there?

THE COURT: They will, counsel. If we can do that. Mr. Barlow, you are not proposing that Mr. Wright start over, though, are you?

MR. BUGDEN: I think he will be even better the second time.

MR. BARLOW: I'm sure he will.

THE COURT: Mr. Wright is trying his best not to wear out his welcome, gentlemen. Don't volunteer him for things he doesn't wish to do. I think that might work well enough. Thank you, gentlemen. As best you can.

MR. BARLOW: Thank you, Your Honor. May it please the court and counsel. Contrary to counsel's argument, we believe that 76-5-404 (11), the section of the code which defines one way that consent may be overridden, that is, be by coercion or enticement, is sufficiently precise as the

court found in another case, in Sorry (phonetic), about enticement over the internet, that it does not leave potential defendants without clear notice of what is prohibited. And it does not allow for discriminatory and arbitrary enforcement of statutes where consent is an issue relying on that subsection.

And as to the first amendment argument, because this is a neutral law of general applicability, it does not violate the free expression provisions of the first amendment.

The court noted general rule of statutory construction statutes carry a significant presumption of constitutionality. It is presumed that the legislature used the terms that it used with purpose. And it is incumbent upon courts to construe those terms in a clear and understandable way if they can. The court in Gibson and in Scieszka, I'm not going to get this right either.

THE COURT: Scieszka.

MR. BARLOW: Zesca.

THE COURT: And I am probably offending every Czech speaking person in the planet, but we'll say Scieszka, counsel.

MR. BARLOW: Thank you. I practiced last night, but I knew I wouldn't get it. Those courts said that trial courts should not indulge attempts to inject out into meaning

when no doubt by a normal reader is present. And that is certainly the case with enticement. In fact, it's interesting that "entice" or enticement is found in Black's Law Dictionary. Clearly, this is a term that Black and the various iterations of Black's Dictionary understood to be a term used in legal context. And even though there were, I think, by Mr. Wright's count, 19 different definitions, that would also be true of such terms as reasonable doubt, a reasonable person --

THE COURT: Counsel, if you get me a reasonable doubt instruction that makes sense in English, give it to me, because I haven't found one, yet.

MR. BARLOW: Well, we have all struggled with that one. And I know that prosecutors and defense attorneys clearly have two versions which are found to be correct, and it's left to the court to decide. Nevertheless, "entice" is not a word that is so elusive of understanding by a common person that it is subject to void-for-vagueness issues. As I mentioned in State vs. Sorry, which is a different statute, but where the crime itself is called "enticement of a minor over the internet." And it is the crime which prohibits enticement of minors over the internet for sexual purposes. In that case, I believe it was, again, Judge Orme who found -- no. I apologize. It might have been Judge Wilkinson, still on the court of appeals, who said that

"enticement" or "entice" was a word that was sufficiently precise to give defendants notice of what was prohibited.

THE COURT: Counsel, I don't really have a problem with the term "entice" as it has been addressed in those two appellate court cases. Being a trial court judge, I know that constitutional questions are usually made at a much higher peg rate than mine. But take the position that Mr. Wright has given me. Take our priest, a young new priest asked to perform a marriage. The bride is 17, the groom is 22.

MR. BARLOW: Which in Utah would not be a crime, Your Honor.

THE COURT: The bride is 15. The groom is 19. No, the groom is 18. He can lawfully marry without permission. And that's another story. Anyway, the priest is inexperienced, does not, prior to the performance of the marriage, look at the marriage license to look at the dates of birth and make any independent determination as to the age, goes ahead and performs the marriage, gives them some advice that can be found deep within the lines of Genesis and, thereafter, finds himself prosecuted because of the bride's protestations. If anything, a priest engaged in an act of negligence. And maybe that's what saves him because he did not take the time that a priest in similar experience in that area would have to look at the marriage license.

Maybe just common ordinary run-of-the-mill negligence, not even criminal negligence.

Mr. Wright's worried about that cleric being prosecuted for first degree felony rape. I know the factual differences in this case. Are the factual differences in this case enough to save that particular problem?

MR. BARLOW: Absolutely. I believe so.

THE COURT: From constitutional challenge?

MR. BARLOW: Certainly.

THE COURT: Well, what about this language that Mr. Wright gave me that we don't leave it to the courts to determine whether or not this conduct is prohibited? You just going to leave it to jurists like myself to say to juries, ladies and gentlemen, this one isn't coming to you, I find it constitutionally vague under these facts? Or, ladies and gentlemen, I think it makes constitutional muster. Take your best shot at that time, then we'll let the appellate courts deal with it? Doesn't that invite confusion?

MR. BARLOW: I have a couple of responses to that, Your Honor.

THE COURT: Go ahead.

MR. BARLOW: First, of course, we are not dealing, as the court noted, with merely the performance of some kind of a religious ceremony marriage. We have many other factors preceding the marriage; in some cases, according to the

testimony in the preliminary hearing, by years and years and years at the Alta Academy; discussions with the child before the wedding occurred, or the marriage ceremony; discussions after, other cultural factors of which both the defendant and the child victim were aware. That's a difference.

Moreover, we have a mens rea requirement which was not really addressed by Mr. Wright and was perhaps implicit in your question, but not explicit, which is very critical, according to the cases.

THE COURT: Knowing, intentional, reckless.

MR. BARLOW: Exactly. And you suggest that negligence, under the circumstances of our priest, again, these are terms which juries define every day in every courtroom in the country. And with all of the facts we have here, not just the isolated ones that counsel referred to, it certainly is sufficient for a reasonable jury to draw reasonable inferences and to make a fair and just verdict either for acquittal or for guilt. Such a determination and such guidance from the court does not offend due process and does not render this subsection either void because it's vague nor an encroachment on the first amendment.

THE COURT: Counsel, both my hypothetical priests and Mr. Jeffs himself do occupy this unique setting of a cleric involved in these transactions. The free exercise clause has been brought to my attention by the defense. Let me give you

a chance to specifically address that from the state's standpoint.

MR. BARLOW: I would add to your premise that the defendant enjoys other positions of special trust perhaps not enjoyed by a cleric. He's not only the leader, ostensibly, of a religion, but he's also the leader of a community, both culturally, economically, socially. At least, those might be facts adduced at trial which may have some bearing on it, a jury's decision.

THE COURT: Counsel, with respect to the specific person in special trust or special relationship to the victim, it doesn't mention mayor in there anywhere. It doesn't mention chief of any number of committees or anything. It's rather specific.

MR. BARLOW: Well, it is specific, Your Honor. But it is including but not limited to statute.

THE COURT: If I go much farther afield from that, counsel, I do see a constitutional mine field out there that might never quit. If we were to go to someone based upon the respect that they are held in a community, every community -- we just noted the passing of the last Utahn who was on the Jimmy Doolittle, 30 seconds over Tokyo raid. That person, at least, should have, maybe for those who don't know history well enough didn't, but should have enjoyed enormous respect. I'll never forget talking with members of the Navaho nation,

speaking in real reverence of the members of their community who were code talkers. That's not the kind of position that the legislature was talking about in this statute, was it?

MR. BARLOW: Well, neither of the two examples you gave me. I think, there are positions of special trust, circumstances which may obtain here. However, I have digressed from your hypothetical.

THE COURT: All right, counsel.

MR. BARLOW: I would say as for the first amendment issues, again, as I noted in my opening statement, the statute in question here is operationally neutral. It is a law of general applicability. It does not clearly prohibit conduct because of its religious or purported religious nature. It prohibits conduct because it is unequivocally and demonstrably dangerous and harmful to children. And it would apply to religious speech, to secular speech, and to any combination. It is that which is prohibited, not speech because of its religious nature. And in order to find some violation of the first amendment under the free expression clause, I think the court would have to find that it was directed at religious speech specifically, not the conduct which is harmful to children, which is really at issue here.

THE COURT: All right.

MR. BARLOW: Anything further from me, Your Honor?

THE COURT: No, counsel. I think I have heard from

the state's standpoint.

Mr. Wright, let me give you an opportunity, if anything, that's come to mind on this particular issue that you would like to draw my attention back to. Go ahead, counsel.

MR. WRIGHT: Yes, sir. Only to reiterate that this prosecution or the application of this statute, when combined to the rape as an accomplice, where the actor has not been accused, but we are merely going after a 19 year-old driver who invites someone to a party, it creates a more difficult notice application on the driver. And it creates, in this case, the greater danger as pointed out by the supreme court which, quoting Kolender again, "Although the doctrine focuses both on actual notice to citizens, an arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine is not actual notice but the other principle element of the doctrine. The requirement that a legislature establish minimal guidelines that govern law enforcement where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal predilections."

And our concern here is the pursuit of personal predilections by the prosecutor and then by the jury who makes the decision when the accused is a representative of a

church that they may disagree with. Thank you, Your Honor.

THE COURT: All right. Thank you, counsel. Well, the court having reviewed the memoranda filed by both sides in this case, having reviewed the statute itself, of course, being completely and fully advised in the facts of this particular matter, the burden to persuade the court that a standing statute within the code passed by the legislature is unconstitutionally vague is a heavy one. The court has to be convinced, especially a court at a trial level, has to be convinced that this statute is not susceptible of constitutional definition, that the terms in the statute are used so broadly as to invite arbitrary enforcement. And I simply can not find that in this case. Under the facts of this case, the term "entice" easily applies to the evidence heard by the court at the preliminary hearing. The notice requirement that due process demands would place someone in Mr. Jeffs' circumstance well on notice that this marriage ceremony and the duties attendant to it are being resisted by this young woman, and that any words to encourage her to go against her will could easily be seen as enticements. And, therefore, I'm going to overrule and deny the motion to declare 76-5-406 sub (11) unconstitutionally vague.

Counsel, I think you have an excellent record on that. Let's go to our next motion. And that is the motion to quash the bindover. Miss Isaacson, you are on your feet.

I presume this one is yours, counsel.

MS. ISAACSON: You are correct, Your Honor.

THE COURT: All right. Go ahead, counsel. As you can tell, I have read your motion carefully. Your memoranda, I have it before me. If you want to cite me to anything specifically, I'm ready to turn pages. Go ahead.

MS. ISAACSON: Your Honor, we would ask the court to consider quashing two aspects of the bindover. And, of course, the court made very detailed findings as opposed to -- as to which provisions you were going to bind over this case for trial. And the first ruling that we would ask you to quash is your ruling that Allen Steed, Miss Wall's purported husband, that he held a position of special trust. Now, of course, we look to 76-5-406 subsection (10) for the definition and sort of the beginning of the definition of what constitutes a position of special trust. Subsection (10) just lists a handful of particular relationships that are absolutely, no matter what, going to be positions of special trust. We don't have to go any further in the analysis if we see this relationship. Parent, stepparent, adoptive parent or legal guardian. That's in the subsection (10) of 406.

Then, subsection (10) refers us to 76-5-404.1 for, basically, an expanded definition of position of special trust. And that subsection gives us another list. We go

beyond the parent. We go beyond someone in the parental role. And we talk about other relationships where it's clear that the legislature, we, as a community have decided, you know, if someone's under the age of 18, and they have a relationship with an adult that's characterized by these different labels, a parent, stepparent, and then they go on to say things like, well, we are going to actually say there are other relationships that we were concerned about. We are concerned about the relationship of coach to student, teacher to student, employer to minor, grandparent, uncle, aunt. There is a quite a long list of relationships that we have decided. We are just going to say, you can not consent. Even if a 17 year-old willingly has intercourse with an adult teacher, the legislature said even if factually there is consent, legally we are going to say they can not consent. So, it's a strict liability statute. Doesn't matter what the actual factual consent issue was.

Now, the court, in your ruling, correctly ruled. And I am going to be specific about your language. I know you know what your ruling is, but for purposes of the record I'll be specific. In your ruling, you indicated Mr. Steed -- and this is on page 148 of the continued preliminary hearing, lines 19 through 21 -- "Mr. Steed was the actor in the trip wire threshold event that must be found before Mr. Jeffs' liability could even be considered." And I think that was a

term that you used on a number of occasions because, of course, we are dealing with accomplice liability in this case. And Allen Steed, his conduct, his liability, his responsibility is the trip wire. Before we get -- before we even talk about Mr. Jeffs occupying a position of special trust, you have to find, and you so found, that Allen Steed held a position of special trust. So, we don't get to the issue of Mr. Jeffs' religious leader, we don't get to Mr. Jeffs as a former teacher. We don't get there unless Allen Steed held a position of special trust.

Now, interestingly enough, towards the end of your exchange with Mr. Barlow, there was kind of a little segway to this issue of position of special trust. And I think you made reference to a mayor, made reference to code talkers, or other people of respect in the community and said to Mr. Barlow, hey, I think, you know, the list can't be forever. It can't be anyone who is respected in the community who holds a position of special trust. I mean, why did the statute be created in the first place? Why did the legislature do this? Because it would never be contemplated that it would be appropriate for a minor to have relations with a parent. These things are obvious. Decided it's not appropriate with a coach, not appropriate with a teacher, not appropriate with a grandparent. These are things that are obvious.

And then we get to this phrase in 404.1 that basically defines what position of special trust means. It means that the adult holds a position of authority by which they can exert undue influence over the minor. And it's true, as Mr. Barlow indicated, that the statute provides that the list is not exhaustive. The list that we have talked about, the types of relationships that I have mentioned, you know, you can still find other relationships that are going to occupy that position. But it's our position that a husband and wife relationship, just like the mayor example, should never be part of that list. Why?

THE COURT: Counsel, let's take the specific facts of this case so I can follow your reasoning. Because, first of all, we don't have a husband and wife relationship. This was not a lawfully licensed and sanctioned union. This was done, basically, as a pretext to place Mr. Steed in that relationship without lawful sanction, because the statutes of the state of Utah would not have put up with it, nor do I believe would the statutes of the state of Nevada would have done so. But you might have to ask Mr. Wright about that. I suspect he knows more about Nevada law than I do. But this is not like husband and wife. Legally, it can not be. I understand your argument, but I have to draw that distinction here. This is a relationship that is created within the community. And that's, again, where I see it getting a

little bit elusive. I'm not going to call them husband and wife because they are not, not under the law that we have it before us now. But there is some kind of relationship established here, within the Hildale community, that is created by this union. Take it from there, counsel.

MS. ISAACSON: Let me jump to the specifics of your ruling and kind of talk through that part of it. And this fabric of the community concept, you indicated at the continued preliminary hearing and, quote -- this is on your ruling at the end of page 148 and beginning of 149. "By virtue of the fabric of the community in which Miss Wall lived, the Lincoln County ceremony, the pre-ceremony interview, and as it applies to count two, the post-ceremony interview." And you were indicating that this is part of the position of special trust with respect to Mr. Steed, if I understood in your ruling correctly. Then you go on at the beginning of page 148, lines 2 through 5. And the court ruled, "While not lawfully a husband, his status was urged upon Miss Wall in that fashion. And, therefore, he, in her mind, occupies a position of special trust."

And so, my understanding of your ruling and, certainly, Miss Wall testified, she believed she was married. On preliminary hearing, page 137, line 9, "I was now his wife after that ceremony." Certainly, she perceived herself to be in a husband and wife relationship. The sisters did. They

testified to that. The whole community treated them as if they were husband and wife. And the position of special trust, at least as I understand your ruling, and as you articulated at the continued preliminary hearing, was part of the analysis was the reason why he had power was because he was a purported husband. I understand they were not legally married. I understand that. But the reason why the husband and wife relationship is different from these other, coach, and whether it's purported or legal, why is it different from the parent relationship? Why is it different from the coach relationship? Well, it's anticipated, as the court has said many times, that at some point there is likely to be intercourse. There is likely to be sexual contact. And the court has said that many times.

So -- and I'm kind of getting off track here as we kind of jump around. But I think when the court made its ruling with respect to the position of special trust, the only way Allen Steed, according to the testimony, was able to exert undue influence, if you come to that conclusion, would be as a status as purported husband. And the response of the state to our motion to quash with respect to this particular issue, and now I'm kind of shifting to a different issue, their response as to why Allen held a position of special trust was because of Rebecca Musser's testimony about the community, about the religion, the teachings of the religion,

about obedience to your husband, those sorts of things. And, certainly, it's our position that it would be improper for Miss Musser to decide that Allen Steed holds a position of special trust. And then, when Elissa Wall goes on to say, and this was quoted in the state's brief, when she goes on to say, "I felt like he had power over me. Or, I felt like because of his status as my husband I felt this pressure to comply" -- she doesn't, by her own subjective belief, the alleged victim, doesn't get to say this adult occupied a position of special trust. That's for the court to decide. That's for you to decide.

And the one part of this analysis, the first part that we are concerned about is this husband and wife analysis that's part of the ruling at this point. We are concerned about including that in this list. Just like -- I mean, I understand mayor is a big jump. But I'm saying, I'm asserting to you that this jump to purported husband and wife to include that in the list is not proper.

THE COURT: Counsel, rape, under Utah law, can still occur between lawfully wedded persons, husband and wife. The actual husband and wife relationship, no longer, when I began practicing law, that was different. But, now, since the statute was amended, rape can occur within marriage.

MS. ISAACSON: Correct.

THE COURT: Nonconsensual sex can be a first degree

felony. Doesn't that have a tendency to weaken your argument somewhat? How do you deal with that?

MS. ISAACSON: Well, really, that can be dealt with with other statutes. Certainly, the consent statute you express through conduct or words. I don't want to have sexual intercourse with you and you say that to your husband and that's good enough. That fulfills the purposes of the rape statute. That's covered. We have got that dealt with. But, again, we have got this -- we have got this particular statute, strict liability statute. And to say that a husband and wife, or a purported husband and wife, that this husband falls into this category of position of special trust, we should be limiting, just as you indicated, we should be limiting the application of this subsection (10). We shouldn't be expanding it to make anyone who is an adult who engages in sexual contact with someone under the age of 18 because, really, as you indicated, it could become so broad, and I'm afraid that this husband and wife aspect is part of making it too broad. Because it is anticipated that at some point a husband and wife would have sexual relations. It's not like a parent and child where that would never be acceptable.

THE COURT: And, therefore, the bindover should be quashed as to that element?

MS. ISAACSON: Just to subsection (10), Your Honor.

So, let me just talk a little bit about some of the religious implications. You know, I think this court has worked or, at least, has articulated on many occasions that the court will not and does not want to characterize the culture in Colorado City, the followers of Mr. Jeffs as some sort of negative broad brush strokes.

THE COURT: We simply will not engage in stereotyping, counsel.

MS. ISAACSON: That's exactly what you said. And I just want to quote, before I get into my argument, an exchange that you had with Mr. Shaum at the end of the preliminary hearing. And Mr. Shaum had stated, and this is on page 52, line 16. Mr. Shaum stated, "That's the way the culture works out there. They are to get married and have children. He knew what was going to be the obvious result of that marriage."

And, Your Honor, you were very quick, and I think very appropriate, to interrupt and say, "Counsel, let me caution you at this point to avoid the concept of that's the way the culture works out there. The court can not and should not simply stereotype and draw facts or conclusions from that setting." I think that was completely appropriate. And we appreciate the court intervening and saying we are not going to stereotype. But, part of the analysis in this subsection (10) ruling does get into stereotyping, does get

into the issue of the religious overlay. And, ultimately, what happened in this part of the ruling is that there was the talk of Allen Steed being a priesthood head. And what the state talks about in their memorandum is how you have this relationship with your father as a girl in this community. And you have complete obedience and loyalty to him. And then when you are married, legal or not, when you are married in this community, then all loyalties and everything transfers to the husband. And there is this concept and the argument that the state made at the end of the preliminary hearing was that you should find a position of special trust because the way that Allen Steed held the status and was able to exert undue influence as a status of a purported husband and a priesthood head. And, basically, how I have tried to think about the ruling, and what it would ultimately mean if we were going to write a statute that would apply to the facts of the ruling in this case, it would be that purported wives in the FLDS faith, as practiced under Warren Jeffs, can not consent to sexual intercourse with their purported husbands until they're age of 18. It would be a very religious specific concept. And, certainly, the concept of priesthood is something that we see in other cultures. We certainly see it in the LDS faith. Most couples, married couples in the LDS faith have a situation where the man holds the priesthood and the wife does not.

Our concern is that the way that this whole subsection (10) has been applied is we are kind of encroaching on that area of having to make an analysis based upon religious practice and religious belief.

THE COURT: And Hialeah tells us we should be very cautious in those waters.

MS. ISAACSON: Absolutely. And that's the thing that stands out to me in this aspect of the ruling, there is the husband and wife aspect. But, more importantly, this concept of priesthood, this concept of how the community works, this is a religious community. And that's -- that's how the culture works. But we are talking about religion. And we are talking about the practice of religion. And to say that only FLDS men can hold a position of special trust in a purported marriage, yet, are we going to apply that, then, to if, let's say that there is a marriage between an LDS man who is 19 and a 14 year-old girl who is LDS, and for whatever reason, there is some technical defect or there is a problem with the validity of the marriage, or they just, they go and have a marriage that's not sanctioned by the state at all, for some reason, because of his priesthood status, because he holds the priesthood in the home, are we going to say that he holds a position of special trust? That's the sort of the next step that we are concerned about, how this affects the religious aspect.

THE COURT: Counsel, why is this not something that a jury can look at and make a determination based upon the evidence in the testimony that they would receive during trial? Why is it that a jury is incapable of looking at this setting and conducting this analysis within the context of these parties, these people, and make that kind of a decision? Why hasn't it reached the probable cause level to allow a jury to do that? Why should I, as a matter of law, take that out of the hands of eight citizens and however many alternates that we want for trial?

MS. ISAACSON: Because this is brand new stuff. And I think that -- I can't even think of a case where there's been urged that the position of special trust should be expanded in this way. And I think that by putting it in the hands of the jury this is not what the Utah Legislature intended.

THE COURT: Didn't the legislature give us this open window to look for unique circumstances and in giving us this open window, give us the opportunity to craft our work here for that setting? Isn't that why they drew the statute this way?

MS. ISAACSON: I think they absolutely did. But it's our position that this is not the case, and that they did not intend that purported husbands and wives, and they certainly didn't intend that religious practices be analyzed and

scrutinized in determining whether or not someone holds a position of special trust. The analysis was not that. And, again, we don't get to Mr. Jeffs until we finish with Allen Steed. But the analysis was not that Mr. Steed was a religious leader. Instead, it was this kind of a fabric that you observed or described of the religion, of the priesthood and of this husband and wife relationship. And, again, I understand that there is no legality. But, Miss Wall believed she was married. And the court, in your ruling, specifically made reference to the fact that the parties that, it was urged upon her that "this was your husband." And it was urged upon her that he holds the priesthood. And I just -- we have got plenty of other ways to move forward in this case, Your Honor. And you have so ruled. And I just think that this portion, this strict liability below the age of 18, this ruling is just an expansion of the statute that I don't think that the Utah legislature intended and that we don't think is proper.

THE COURT: Thank you, counsel. In behalf of the state, who is going to argue this side of it from the state?

MS. ISAACSON: Well, Your Honor, we have one other aspect of our motion to quash. I forgot.

THE COURT: Oh, my apologies, counsel. I thought you were done.

MS. ISAACSON: Well, I'm just getting started, Your

Honor. No. Actually, the bulk of the argument, I think it's a little more complex when it comes to subsection (10). But we also ask you to quash the bindover with respect to this issue -- and this is sort of the flip side on the subsection (10). We've got Allen as the trip wire. And I'm asking you to reject him being the trip wire. Now, on this other argument, I'm referring to the subsection about lack of consent with respect to words or deeds, subsection (1). And we are not asking you to quash -- well, we are asking you to quash the bindover. I'm not asking you to re-examine your ruling on Mr. Steed. I'm conceding for purposes of this argument that, at least, at the probable cause level, your ruling that there was sufficient testimony given inferences to the state that Miss Wall expressed lack of consent through words or deeds to Allen Steed we are not challenging that at this point for purposes of the preliminary hearing. What our argument is, is that with respect to subsection (1), that Mr. Jeffs was not aware that unconsented sex, sexual relations were taking place between these two. And I'm just going to briefly -- I have outlined it in detail in the brief, but -- and I understand this concept -- well, let me just back up. The state has to establish, number one, intercourse was occurring. Number two. That Miss Wall expressed nonconsent through words or deeds. And in order to get to Mr. Jeffs, that he knew unconsented sexual intercourse was happening and

in some way aided and abetted that. This is where we believe the state's proof failed at the preliminary hearing. And I understand this concept that everyone keeps repeating, or the prosecutors keep repeating, that, well, when she said, I hate this guy. I don't want to marry this guy. I think he's a creep, that that somehow, the inferences that, well, there is no way she would have consented to sexual intercourse with him and so, Mr. Jeffs should have known.

Marriage happens for a lot of different reasons. Some people marry for love. Some people are very attracted to one another and the issue of intimacy is forefront on their mind. But people marry for other reasons. And people marry for security. People marry for money.

THE COURT: Or for a green card.

MS. ISAACSON: Or for a green card. They marry for a variety of reasons. And, although, I understand what Miss Wall expressed about the marriage, it's also true that Miss Wall acknowledged, as I asked her on cross-examination, that she was someone that wanted children. And I'm just asking you to think of a situation where, you know, maybe I'm at the point of my life where I want to have children, but I haven't fallen in love, I haven't found the right person. Well, I might marry someone that I don't particularly care for. I might enter into that marriage relationship reluctantly. But I really do want to have children, so I'm willing to engage

in intimacy with that person for the sole purpose of having children. Not because I want to, but that's because the way children made. So, in this case and, of course, the culture, and you have heard at least the dating culture or lack of dating culture, the way that things worked in this community and what Miss Wall believed was appropriate, what Miss Musser believed was appropriate, was there was no dating. There was no courting. And it was very common that when you were placed with someone, that you were very unfamiliar with them. And so, it certainly would be -- and everyone on board, and there was a long list of people who spoke with Miss Wall about the marriage and encouraged her to marry. We had her mother. And her mother said things like, you know, you'll learn to love him. Give it time. You'll be happy. Her sister, Rebecca Musser, who was here, said that she talked to her at length. Said, you know, this is the right thing for you to do. There were also some other discussions about some other things. But, really, no one contemplated mother, any of these people who were counseling Miss Wall, no one expected that, oh, we expected there was going to be unconsented sex here. The goal and the hope of everyone was that even though there was this reluctance about marriage that she would grow to love him and, certainly, no one expected that there would be unconsented sexual activity. That was not the plan. No one planned that. No one expected

that or wanted that. And you heard that from everyone in her family. So, I don't -- the idea that Mr. Jeffs was put on notice that because she was reluctant to marry this man didn't want to marry this man, that, ultimately, there would be unconsented sexual activity is one of those inferences, one of those jumps that State v. Virgin talks about.

THE COURT: Well, counsel, let's take Clark and Virgin, Pledger, that line of cases, talking about what happens at a preliminary hearing. You have given me a series of inferences that the court could draw from this in order to steer away from bindover and quash it. Hasn't the supreme court and the court of appeals told this trial judge that when I have a series of inferences I have to draw them in favor of the state's theory?

MS. ISAACSON: Well, I think that's true. But --

THE COURT: Virgin gives me a little bit more wiggle room than I had before that case gave the opinion. But other than that one, I don't have much, do I?

MS. ISAACSON: Well, as the court noted in your ruling, you are no longer a potted plant.

THE COURT: I'm glad to hear that, counsel. I'm glad somebody else thinks so.

MS. ISAACSON: And Virgin, at 137 P.2d 792, said that, "Magistrates are free to decline bindover where the facts are provided by the prosecution provide no more than a

basis for speculation as opposed to providing a basis for reasonable belief." It's our position that it was a reasonable belief of Mr. Jeffs to think that there would be consensual intercourse. I understand that the initial reluctance. But he did not know, for example, there were some things that Miss Wall testified to that she ran from Mr. Steed. Mr. Jeffs was never told about that incident.

THE COURT: Well, we certainly don't have any evidence of it.

MS. ISAACSON: At least, she didn't mention that she discussed that with him. She talked about what she did discuss with Mr. Jeffs at length. We just believe that the inference that her reluctance to marriage was a prospective declaration that she was going to not consent to sexual intercourse in the future is just speculation. That's our position.

THE COURT: Okay.

MS. ISAACSON: Let me just make sure I have covered everything.

THE COURT: I'll be still.

MS. ISAACSON: Oh, there is one more item. Miss Wall testified, preliminary hearing, page 170, lines 10 through 11, and noted that in one of these meetings that Mr. Jeffs actually said, he asked, quote, "He asked us if we had ever tried to have children." That in and of itself shows a lack

of knowledge on the part of Mr. Jeffs. Why would he ask that question if -- and this was late, late into the relationship. Why would he ask that question if he knew they were having intercourse or unconsented intercourse? That, to me, suggests actually the opposite. The teachings and the ceremony, the teachings that came before, the meetings, the ceremony, they were not a command to have unconsented sex. And we believe that you should quash the bindover with respect to subsection (1) with Mr. Jeffs being an accomplice under subsection (1). Do you have anything else you would like to ask me?

THE COURT: I think we have covered it, counsel. Thank you.

MS. ISAACSON: Great. Thank you.

THE COURT: From the state, Mr. Shaum, you are going to address this motion?

MR. SHAUM: Yes, Your Honor.

THE COURT: All right, counsel.

MR. SHAUM: First of all, Your Honor, I think a few distinctions need to be made in this particular case. There have been references made in the defense's brief as well here today comparisons made with other churches and this culture or this particular religious group and Mr. Jeffs. There are some unique features to Elissa Wall's situation that she found herself in when she was married off to Mr. Jeffs.

Number one --

THE COURT: Mr. Steed.

MR. SHAUM: Steed. Excuse me. Number one. She was a minor, a 14 year-old girl at the time of this alleged marriage. Number two. She found herself in the position of becoming a bride through an arranged marriage type of condition or position that she was put in. She was told she was going to marry not just anybody, she was going to marry her cousin, and then was whisked off and put into a marital ceremony and married, so to speak, or was given to Allen Steed in a fraudulent or fictitious marriage ceremony, because it was illegal in the state of Utah. And it's quite obvious in the evidence presented at the preliminary hearing that Mr. Jeffs and all those who were involved in that knew perfectly well what they were doing and the illegality of it, hence, they leave and go off to some hotel in Caliente, Nevada to accomplish their purposes.

Let me first address now the position of special trust under 76-5-406 subsection (10). That particular subsection only applies to minors. So, when we talk about the potential ramifications of opening up the definition and the possible individuals that could be in a position of special trust, this only applies to those who commit acts against people under the age of 18, minors and children.

The definition of position of special trust itself,

before it lists specific individuals who might be in such positions, limits or restricts or constrains those individuals who might be considered to be in a position of special trust. That position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the victim. It's impossible to expand that definition beyond what is given under the statute. Of course, we do have a list, a nonexclusive list of people that would fit within that definition. It is fair for this court to allow a jury to consider whether or not Mr. Steed was in a position of authority and thereby was able to exercise undue influence over this particular young lady. And that, I presume, if this particular subsection was allowed to go to the jury, that the court would have a jury instruction telling them what to consider and what type of individuals would fit that definition of a person being in a position of special trust.

While at preliminary hearing we gave the court one example of why Mr. Steed is in a position of special trust. There was another example given in the brief that the court submitted -- or the state submitted to the court recently. Not only does Mr. Steed fit the definition of a person in a position of special trust by the fact that he assumed the role of now the parent to this minor girl and all of her loyalties were to be transferred to her, but by Mr. Jeffs'

own instruction to her and own counsel to her, he became her priesthood head. What does that mean? He was to give herself to him and that, essentially, she was to talk to God through him, through his priesthood.

State submits to the court today that that position of special trust looks an awful lot like a religious leader. He becomes her voice to God. He becomes her religious head. He becomes her spiritual head. And, therefore, not only does he become a person in a position of special trust as an adult figure over her, but as a religious leader over her as well.

The state simply is not stereotyping any religious, any religion or culture. We are focusing on the teachings and the counsel that Mr. Jeffs gave to children at the Alta Academy, to Miss Wall prior to the marriage and after the marriage, during her first visit to him when she said she wanted a release.

Turning to that particular time, she came to him after the marriage and said, I can't do this. I just can't be Allen's wife. He tells her, You will learn to love him, that Allen was her priesthood head, that she needed to be obedient without question. And, again, we are not talking about an adult who has some level of choice here. This is a minor who is told, you be obedient to this man because he is your priesthood head. She asked for a release. How does he respond? Give yourself, mind, body and soul to Allen.

There is no question that Mr. Jeffs intended Allen Steed to occupy a position of special trust. He defined what his role was to be, defined that to this 14 year-old young girl and then placed him in that position so he could indeed occupy that position of special trust to exercise undue influence over Elissa Wall, including to have unconsensual sexual intercourse with her.

Turning to the subsection (1) of 76-5-406, counsel stated that marriage happens for a variety of reasons. I would submit to the court that the most obvious reason is to bond, to have a bond, to be unified as a couple. But, as part of that, and certainly as was taught to these children at the Alta Academy and in the Hildale/Colorado City community, is to have children. Evidence presented at the preliminary hearing from Rebecca Musser and from Elissa Wall was that you are supposed to have children immediately. That marriage meant children. Mr. Jeffs, obviously, knew that. Mr. Jeffs taught that. While there might be other considerations, other possible reasons to get married, the main reason is to have kids. And, as the court has pointed out, absent some sort of medical intervention, it's going to happen through intercourse.

There is no indication in any of the evidence presented at the preliminary hearing that Miss Wall entered into this relationship other than because she felt pressured.

She felt there was no way out. Despite her protestings that this was going to happen, this was going to go forward and, if she didn't, she was in jeopardy of being removed from this community.

Going back again to the testimony at the preliminary hearing, prior to the marriage, Miss Wall, when she finds out she is to be married, calls Warren Jeffs, told him what was going on. And that he told her then he was going to talk to Rulon Jeffs and get an answer for her and to tell him that she was too young, didn't want to get married. Later, when she found out that, apparently, from, according to her assigned father, Mr. Jessop, that Warren had said this was God's will and you are to do it anyway, she had a meeting in Warren's office. And she told him, I don't think this is right for me. I need to have some time to grow up. I'm not prepared for this kind of responsibility. I'm not willing to marry my cousin. Flat out, I'm not willing to do it. What did Mr. Jeffs tell her? He directed her to do it and said it was the will of God, that this was a revelation from God. After she has the conversation with Rulon Jeffs when she tells her, "Honey, follow your heart," Miss Wall tells that to the defendant. And the defendant, of course, says, well, your heart's in the wrong place. This is your mission and your duty. He is not taking no for an answer. He's got his no. He's got his words. He's got every indication that this

girl does not want to go forward with anything to do with her cousin. In fact, she said, Well, if I've got to marry somebody, can I marry somebody else? Mr. Jeffs tells her, that is for the prophet and for myself to decide. It's not her decision. That's for them to decide who she will marry.

She tells Mr. Jeffs, I won't do this. I can't do this. And this is prior to the marriage. Then, of course, as the court knows, there is much in her conduct at the marriage ceremony indicating that she's unwilling to do this. On several occasions, he has to repeat. He has to repeat to Miss Wall, to hold his hand -- to hold his hand when the marriage ceremony begins. He has to repeat the marriage vow and actually get her mother up beside her to support her before she would be willing to say "yes" or "I do" or whatever. He, then, has to repeat for her to kiss Allen Steed. Her conduct is showing anything and everything but a willingness to go forward with this relationship, not just the marriage, but anything that might occur during that marriage. And that includes sex.

Now, this is a young girl who doesn't even know what sex means. But if she did, she would have certainly told him at that time, that I don't have to have sex with this guy. I don't want to kiss him. I don't want to hold his hands. I don't want to be with him. That wsa what she communicated to Mr. Jeffs. And Mr. Jeffs knew from the very beginning, from

the first contact, that she did not wish to engage in any kind of relationship with her cousin.

Finally, after she is married off, and Mr. Jeffs puts her hand on Allen's hand and says multiply and replenish the earth and bring up children in the priesthood, it's pretty obvious there. I mean, there is no question what he is saying there. Bring up children. What does that mean? Go have intercourse so that you can procreate. And she comes back and says, hey, I can't do this. I want a release. I just can't be Allen's wife. He touches me and does things to me that I don't think are right. And that is when Mr. Jeffs said, well, he's your religious head. You need to be obedient to him without question and give yourself mind, body, and soul to Allen. These are man/wife relations. And this is what he is supposed to do. She asks for a release. And he said no. There is not one indication in any of their communications when the whole issue of whether or not Elissa Wall should be married, let alone to her adult cousin, did she ever indicate to Mr. Jeffs that maybe she would be willing to do it for other reasons. He knew it. He ignored it. He commanded it. He said it was her duty and told her that there would be ramifications if she didn't do it. He is on perfect notice by words or conduct that she was not consenting to sexual intercourse. Thank you.

THE COURT: Thank you, counsel. Miss Isaacson, we'll

give you some rebuttal.

MS. ISAACSON: Well, Your Honor, with respect to the position of special trust, the reason why we have preliminary hearings and the reason why you are asked to evaluate the evidence is that we want to make sure that we ferret out prosecutions that are not warranted under the law. And I understand that -- I mean, this is a situation where this is a very novel, I would say truly unique expansion of this statute, position of special trust. And, certainly, nothing, nothing that I have seen reported comes close to this sort of expansion of the list. The list can be expanded, but I think that this expansion is one that should not go forward. The idea that, well, this is just a jury question. Well, the reason why we are doing this, the reason why we are going through this exercise at the preliminary hearing is to make sure that the jury is presented with appropriate legal arguments. And, again, this is something that's going way far afield of what, from our position, what subsection (10) was intended to contemplate. The one piece of language is, that I don't think Mr. Shaum mentioned, he talked about this undue influence. Well, there is undue influence, but there is the other counterpart which is position of authority. Well, where did that authority come from? Came from status as husband. Came as status as priesthood head, according to your ruling. The ruling was not that he was a religious

leader of Miss Wall. It was that he was her priesthood head and he was her purported husband.

THE COURT: Counsel, isn't there in that title an implication of some leadership position as the tradition of the culture? There was testified to for the court that the two are intertwined to some extent. Aren't they? Or do you think not?

MS. ISAACSON: Well, the problem is that this concept of the man being the religious head, or whatever you want to call it, this can be found in many cultures. And this expansion, if we look at, you know, I mentioned the LDS faith and the idea of the concept of priesthood holding in that context, I mean, are we going to say that any time that there is a culture in which there is, it is taught that the husband has some sort of position of authority -- I mean, it's a patriarchal concept that the man is the head of the household. And this applies to many cultures, not just cultures in Utah, certainly. And so, again, the idea is that we are getting far afield. If this position of authority comes from religion then, again, we are in that making the determination on some religious beliefs. And that's dangerous ground. That's dangerous ground under the subsection.

Now, one thing that Mr. Shaum said, and I don't know if he, if he was -- which subsection he was referring to.

But he, basically, said that the marriage happened because she felt like she had no choice. Well, she also told us she was a very religious young girl. She believed in the concept of placed marriage. She believed in the concept of revelation. She believed in all of these concepts. And part of the reason -- part of the reason that she agreed, and she told the court this, was because, "I believed in some way that this was the right thing to do because I was a religious person. I believed these things to be true." She doesn't now. So, we are getting a kind of a view of the past coming from her leaving that religion. But, at the time, she described herself as a religious person and someone who believed in all of these things that were taught. And so, the idea that she married for completely out of force, I think it's contradicted by her statements that, you know, she believed in this religion.

And the concept of her saying -- or, she testified and told Mr. Jeffs, "He's touching me in ways that he's making me feel uncomfortable," the inference that there is absolutely unconsented sex going on and that Mr. Jeffs knew it and, again, there's like we have the issue of count one, and we have count two. Count one, all we have got is the marriage ceremony and some discussion about whether or not they are going to be married. I think the court can make a distinction between the interviews that happened later. And

with respect to count one, the fact that she at that point didn't like Allen and was resistant to the marriage and count one time frame, there is just no way that he could have had knowledge, or it's a reasonable inference that he would have knowledge that there was going to be a prospective unconsented sex act.

Certainly, with respect to count one, because of the limited contact and what was discussed, maybe a slightly different situation in subsection (2), but we still believe that the inference is speculation.

And, again, just with respect to both issues, the reason why we have a preliminary hearing, the reason why we are asking you to reanalyze some of these aspects of the bindover is that the supreme court and the court of appeals have said the preliminary hearing serves a real function. And Virgin, the facts of Virgin tell us that it is the job of the magistrate, to review the evidence. And when the state has however many theories they put before you, the court has to carefully look at each theory, look at each portion of the statute and decide, have they met their burden. And if they haven't, those aspects of the ruling should be quashed. Thank you.

THE COURT: Thank you, counsel. Well, the court has looked very carefully at this evidence at the time of the preliminary hearing. And I have re-examined it as my

attention has been drawn by the briefs of counsel. And the court, having looked at it a number of times, still finds the bindover is appropriate. The motion to quash bindover is overruled and denied. And the matter will go forward as bound over.

Now, that brings us to the motion for change of venue. And, counsel, let me question, is there anything that we can do until Mr. Jones gets here, Mr. Bugden? Or should I recess until this afternoon? You tell me, counsel.

MR. BUGDEN: We need to recess, judge.

THE COURT: All right. What time do you anticipate having Mr. Jones here, counsel? 1:30?

MR. BUGDEN: I think that would be the best. He arrives at 12:30. And you know --

THE COURT: Gives some time to have lunch and talk and get ready. Let's plan to come back into session at 1:45, everyone. 1:45. Thank you, everyone. We'll be in recess.

(Whereupon, a lunch recess was taken.)

THE COURT: Thank you, everyone. We are back on the record in State of Utah vs. Warren Jeffs. Mr. Jeffs is present. His counsel is also here.

Mr. Bugden, you are leading the charge on the motion for change of venue, I presume. And you have a witness or two that you wish to call, counsel?

MR. BUGDEN: I have two witnesses to call. Before we

begin, judge, may I just inquire, do you have the exhibit that was included with the change of venue motion?

THE COURT: I do have that, counsel. And I think we need to mark this again. For this one, counsel, I want us all to be very, very protective of the record, make sure that we have a good record for obvious reasons, if this needs to be handled on an interlocutory basis. This exhibit will be marked as Court's Exhibit No. 1 on the motion for change of venue, unless you have already marked some, counsel.

MR. BUGDEN: I haven't.

THE COURT: All right. We'll mark that one as Court's No. 1. Counsel, out of an abundance of caution, the additional press articles that you filed with the court on March the 26th, on your letterhead of March 23rd, I am going to myself staple those together in order to supplement the record because your other press articles are exhibits to your motion.

Court's No. 2 is going to be those supplemental news articles that you wanted, counsel. And that will be also received as part of your record. You would have put it in the exhibit except they came after the preparation of your exhibit.

MR. BUGDEN: Some of them.

THE COURT: Some of them.

MR. BUGDEN: And I'll just indicate before I call the

first witness, so I will, from time to time, we will be referring to Defendant's Exhibit 1. Is that what you called it?

THE COURT: That's Court's Exhibit 1.

MR. BUGDEN: Court's Exhibit 1. Then, occasionally, I have blowups that will correspond to some of the pages.

THE COURT: All right, counsel. We are ready to go on it then.

(COURT'S EXHIBIT NO. 1 and 2
were received into evidence.)

MR. BUGDEN: Okay. Miss Meppen, would you --

THE COURT: Ma'am, would you step forward, face my clerk, raise your right hand and be sworn.

DIANE MEPPEN,
called by DEFENDANT, having been duly sworn, was examined and testifies as follows:

THE COURT: Thank you very much. Please have a seat here on the witness stand.

DIRECT EXAMINATION

BY MR. BUGDEN:

Q It's the hot seat of honor.

A Feels like it.

Q Would you please state your name and spell it.

A My name is Diane Meppen. And the last name is M-e-p-p-e-n.

Q Miss Mappen, what degrees do you hold?

A I hold a bachelors in political science from Utah State University.

Q And when did you obtain that, please?

A Um, 1980.

Q And can you tell me how you got involved in the area of doing that survey research?

A I actually was a student of Dr. Jones at Utah State University. So, I was taking political science classes. That is my major. And I was taking political science classes. And some of those classes had to do with public opinion. And that was my first exposure to public opinion research.

Q And when you were a teaching assistant, what were the subjects that you were teaching assistant in?

A Public opinion research was one of the courses, survey research, another. And I also assisted with the American National Government class.

Q And now, you worked with Dan Jones & Associates then since those teaching days --

A Yes.

Q -- but how long have you worked with him in a professional capacity doing professional surveys?

A Um, 1980, I was employed by Dan Jones & Associates.

Q Okay.

A As soon as I finished my degree.

Q Can you tell the court about the breadth of your experience in survey work. What sorts of things --

A I -- I actually started as an interviewer. And over the 27 years, or the 26 and-a-half years that I worked in survey research, I have filled almost every capacity in the research field. I have been an interviewer. I've -- I oversee projects. I direct projects. I write proposals. That's pretty much everything. So --

Q And you filled pretty much every role along the way in your experience since 1980?

A Yes. That's correct.

Q From the telephoning to doing project management?

A Absolutely.

Q How many surveys would you say you have conducted?

A Dan Jones & Associates, as a rough, very rough estimate, because some years are busier than others, we have probably done over a hundred surveys, 120 surveys a year, I have personally directed probably somewhere in a given year between 45 and 55 percent of those projects.

Q And, as a project manager, typically, how would you describe your role, please?

A I write proposals, meet with clients, determine the best methods to obtain good data. And then I oversee the rest of the staff in all the different pieces that go

together in a research project. So, I am a research director.

Q So, would you decide on the methodology that's going to be used for conducting a survey?

A Well, I help in that decision. The client actually chooses in the end. But we do make suggestions and write proposals about what is, would be the best method to obtain the data.

Q And with the survey you did in the Warren Jeffs case, what was the objective of the survey, please?

A The objective of the survey is to determine the percent of the population that had a predetermined notion about guilt or innocence in the case.

Q And did you do that in a number of counties?

A We did it in three counties. Did the research in three counties.

Q And can you tell me, of course, right now we are in Washington County, so it makes sense that you examined or did at least part of your survey in Washington County. Then there were two others, counties, Salt Lake County and Iron County. Can you explain why you also looked at those counties?

A Yes. Actually, you helped select Iron County, which is the adjacent county to Washington County. And so, we thought that that would be a good place to do an additional

survey. Each one of them were treated as three independent surveys, though, they were asked the same question. Dr. Jones and I suggested Salt Lake County because of its size, it's location and population, actually.

Q So, if I can ask you the follow-up question: So, as you talk about the size and the population in Salt Lake County, why is that significant, or why was that a factor that you took into consideration in conducting a survey in Salt Lake?

A It's the largest county, obviously, in the state by population. And the diversity of people there would make a nice comparison in the research.

Q And when you conducted the survey in all three counties, did Dan Jones & Associates have any particular bias, or any preconceived notions going into the conducting of the survey?

A No.

Q Can you explain to the court the methodology that was utilized in Mr. Jeffs' survey?

A We did a telephone survey. And we treated each of the counties independently. So, each of the three areas, Iron County, Washington County, and Salt Lake were each an independent survey. They were conducted by telephone. Each of the surveys took several days, because we try to do call-backs in any, on any telephone numbers where somebody,

we are not able to reach somebody in order to try to get the best sample that we can.

THE COURT: Miss Meppen, was the calling all done within the Dan Jones firm or did you contract out any of the calling?

THE WITNESS: No. All of the calls -- we have a call center where we train our interviewers. And we oversee those interviewers. We have monitors that listen in on all of, you know, a percentage of the calls, they are always there. And we have phone bank supervisors who are there. It's located in the same building as we are. We have always liked the hands-on with the research.

THE COURT: So, you are in complete control of the entire process?

THE WITNESS: Yes, we are.

THE COURT: Okay.

BY MR. BUGDEN:

Q Did either you or Mr. Jones personally meet with the interviewers, the telephone interviewers?

A Yes. Though the interviewers, every interviewer that worked on this study is a trained interviewer. They go through a training process that's several hours long. Then they do a couple weeks of being under a supervisor and monitors close supervision. The interviewers that worked on this are all trained interviewers who have worked for Dan

Jones & Associates for quite a while. And we hold what we call a briefing on each survey. In the briefing, we tell them what the survey's about, what they might expect, not answer-wise to find on the survey, but in terms of the types of questions, where we'll be calling and things like that. So, we held a briefing with those interviewers.

Q How did you select who was called?

A The sample -- we use two methods to collect, to do sampling. One is called RDD. And that's random digit dialing. It's common in research so you can get people, residents with new phone numbers or that are not listed in any directory or anything. The second way, and we use both methods, especially, when we are calling in smaller population bases, the second would be listed sample, telephone lists. So, we kind of combine the two in the hopes to get a really good cross-section or understanding sampling that that would provide us a fairly good cross-section.

THE COURT: Miss Meppen, in your listing samples that you used in this survey, how would you create that list? You would take a telephone directory and call every 12th name or what? How would you do that?

THE WITNESS: They are actually even more random than that. We take that, a bigger base of numbers that are actually selected and drawn and then randomize that. What you were talking about is where you take every, like you

said, every 20th number, or 40th number. And this actually takes a bigger list of numbers and randomizes those numbers. And then we take the first however many we need to call. In this case, the first 200 numbers of that list because we did 200 in each county. The first 200 numbers in that randomly selected list would be our primary numbers that we would attempt first. And then if the number is no longer a valid number, if we get, depending -- if we get a child, that we need to call back, if we get a "not at home," then we try those numbers up to four times before we move to an alternate number.

THE COURT: Of your roughly 200 calls per county, how many would have been random digit and how many from the list?

THE WITNESS: Probably about -- okay. I'm trying to do the math on this. About 75 of them would be random digit. And the remaining 125 would be listed sample.

THE COURT: All right.

THE WITNESS: And it depends partly on the county. The smaller the county, when you start trying to call random digit dialing. Now, what we do on random digit dialing is, we take the first three digits. So, if we know that a Salt Lake prefix is 278, we don't have to randomize that or we could call all day. What we do is, we know that 278 is a prefix. And we randomize the last four digits. In different populations, we randomize, or we do different amounts of RDD,

or random sampling, just simply because if we took one small community and tried to do random digit dialing, just given shear size, you could call for a long time before you connected with somebody. That's why we do the combination. We try to get those people that are known residents. And then we try to get some people who are new, who are unlisted.

THE COURT: Now, are these calls all made to land lines?

THE WITNESS: Yes, they are. That's -- it's something that is slowly creeping up on our industry that's becoming difficult.

THE COURT: That's right. My college student son at the university has only a cell phone. And I believe everybody in his apartment, all three of them, only have cell phones. They would be excluded just because they are cell users and you don't have cell access?

THE WITNESS: If they are non -- if they do not have access to a land line for this project, that would be correct.

THE COURT: All right. Do you have any analyses of these populations, Washington, Iron, Salt Lake County, that can tell us what percentage of phone users have exclusively cell phones? Do you have any way of finding that out?

THE WITNESS: I do not. But our whole industry, this is something we recognize is going to face us increasingly

down the road. And there are whole groups of the Market Research Association and the American Marketing Association and the public opinion research groups that we belong to that every single meeting these kind of things are addressed and faced because we recognize that as the population, more and more of the population gets cell phones, what -- the one piece that I can tell you that has come out in the literature that we receive from these organizations that we belong to is that right now the difference between those people who can not be reached, the opinions of those people that can not be reached and the opinions of those people who we can, we know we can reach, haven't been significantly different on a lot of issues and subjects. But it's something that our industry is quite concerned about in the future.

THE COURT: Of the entire statistical or population base that you are working with in this survey, is there any feature in this survey other than the one that I just pointed out, the difference between cell users and land line users, any other feature that for you as an expert in the field you would place a question mark by like that one? Anything else in this process that you would question yourself as the architect of this process?

THE WITNESS: Not a given thing. Survey research is a science. And it's not an absolute. And, so always -- so the question's hard for me -- because, always, in the back of

my mind, we know there is a margin of error in everything we do. And so, if that margin of error is plus or minus 5 percent or plus or minus 4 percent, there is always this little bit of leeway because we know that we didn't talk to 100 percent of the population. We know that we, based on statistics, we talked to what is a representative sample. So, it's a hard question to answer without saying yes, because there always is a question mark in our minds that says, you know, there's always that 5 percent, or there's always that 6 percent or that 4 percent that we could be -- that we could be off. So, absolutely, yeah. Yes. Survey research is a science with a degree of error in it.

THE COURT: Okay. Counsel, I stepped on your tongue. Go ahead.

MR. BUGDEN: No. Certainly interested in what you are interested in, judge.

BY MR. BUGDEN:

Q So, tell us exactly what the sample size was in each of the three counties, please.

A They were all in the two hundreds. Let me give you the exact -- they were between 200 and 212. Actually, just pull the results up. We did 210 interviews in Washington County, 212 in Iron, and 206 in Salt Lake. Each of those gives a tolerated error of 6.9. And then each would be different at the end. 6.9 percent plus or minus.

Q I do want to ask you about error rate. But, first, I suppose that your answer will include a discussion of error rate. How do you decide how many people should be called? How do you decide how many people is enough to provide the judge with a snapshot, if you will, of the different communities that you have called?

A It's a science. And so, we have, there's an actual formula that we take the population. And we plug in sample sizes and it will give us a plus or minus error rate. Each of these was based on the formula that's used in all survey research to find that.

Q And so, now let me ask you to explain the error rate of plus or minus 6.9 percent. That's based on calling 200 people; is that right?

A Yes. Yes. That applies to each county --

Q Right.

A Individually.

Q And this is a known statistical figure?

A Yes.

Q It's not Dan Jones & Associates that's calculated this. We could go to any survey group, you know, Cincinnati, in Topeka, everyone would agree that's the statistical error rate?

A Yes.

Q Okay.

THE COURT: Miss Meppen, when I read newspaper reports of your surveys, usually in the political arena, the error rate that you have on those surveys, usually for voter preference for specific candidates, is half or less than the error rate in this activity. Why?

THE WITNESS: We -- larger samples. And that usually is based on money or whatever the client chooses to do by sample size.

THE COURT: As the sample size increases the error rate decreases?

THE WITNESS: Yeah. Exactly. Um-hmm. So, if you do 600 interviews, that's a lot different than if you do 100 or 200 or 300. So, each of them differ. And a lot of it is based on what the client can -- needs, their need for accuracy and the money end of it.

THE COURT: Okay.

THE WITNESS: So...

BY MR. BUGDEN:

Q So, if, for example, you had done 300 interviews, then what would the statistical analysis be of the error rate if you had done another hundred, in other words, per county?

A I'm trying to think. 300. That's such an odd thing to do. Let me take 400. Could I take 400?

Q Sure.

A The error rate on a 400 sample would basically be

plus or minus 5 percent. That's a common one that's used a lot in media that you see plus or minus 4 percent. 3 percent would be somewhere in between the two.

Q And, again, you know that the 6.9 that you testified to in this 200 person survey, that's a reliable statistic?

A Yes, it is. And I think I've kind of simplified this to make it sound like every survey -- this formula looks at population size and then the size of the sample you use. So, it might -- there might be differences if you are doing a population of 10 million versus 28,000. So, those could give different error rates. Even 200 interviews in this, isn't the same as 200 in this. Might be close, but it's not the same.

Q How did you decide or is there a science involved in deciding the order in which the questions were asked in this survey?

A There is a lot of experience that goes behind it. We always start, or it's common for us to start with the what we call the screening questions. Basically, we have an introduction that introduces Dan Jones & Associates. Whether it be a telephone survey or a face-to-face, we introduce ourselves. Then, if there are any screening questions involved, by a screening question it might be to ask for a registered voter. If we were doing a survey that only involved women, it would be to ask for women. You know, is

there a female in the home that we could interview. Those are screening questions. Then, generally, we have some introductory questions where we try to start to focus the respondent on the subject matter so that out of the clear blue we are not talking about one thing and then all of a sudden we hit them with something totally different. So, there's a process by which we try to kind of get them focused on the subject. And then we ask, generally, the key questions of a survey followed by demographic questions. And the demographic questions are generally at the end of the study unless you are trying to screen for women only or only people over the age of 65 or whatever that might be.

Q What was the ultimate question in this survey?

A Whether the respondent had an opinion, had formed an opinion of guilt or innocence.

Q Now, that was number 16? So, that fell -- it's not up there now, but that was question number 16 in the materials we provided the judge; is that right?

A Yes. That's correct.

Q Now, the question number nine, you asked the respondents if they knew what Mr. Jeffs was charged with. Is that correct?

A Yes. That's correct.

Q And you asked that question, before you asked the ultimate question about whether or not the respondent held an

opinion about guilt or innocence; is that right?

A That's correct.

Q Why did you ask those two particular questions in that order? Why did you ask whether they knew the crime then later asked whether or not they held an opinion?

A What we wanted to do before we asked the question of guilt or innocent, make sure that they were talking about, or that as -- that they were answering the question about the case that we were talking about. Sometimes, if you go straight out of the chute to something, and then you start asking them questions about the case, it's almost like a memory refresher. And so, we like to make sure that they are focused on the particular case and then ask the question about guilt or innocence, whether they have formed an opinion yet on guilt or innocence.

Q Now, question six --

Which for your information, judge, besides what you might be reading it is on the blow-up too.

-- is a question where you asked the respondents how effective they believed the criminal justice system was in Utah. Is that right?

A That's right.

Q And can you discuss comparing Washington, Iron, and Salt Lake, what were the basic results about whether it was very effective or somewhat effective?

A The basic results were in Washington, Iron and Salt Lake, there is little difference in the number who feel the criminal justice system, between the counties there's little difference on very effective and somewhat effective. But, basically, around 72 percent of the population, some at 68 to 72, 73 percent of the population saying that the justice system they feel is very effective. This is one of our introductory questions. This is one that starts to get people focused a little more on the subject.

Q Then, question number 11, generally speaking, how accurate do you feel that most of the area news reports are about a person charged with a crime? Were there any significant differences from county to county in the answers of the respondents?

A Not significant differences, no. They are very similar. We go from 82 percent to 78 percent. They are very close.

Q So --

A And that is adding -- I'm sorry, adding a varying somewhat accurates together. I look across that 24, 22 and 20, and I think that those are very close, so I went to the second level. And they are still very close.

Q So, so far, at least in comparing Washington County with Iron County or Salt Lake County on the question of how effective is the criminal justice or how accurate is the news

media on reporting events surrounding a crime, Washington County is in tune with everyone else, at least, the other two counties?

A They are all similar.

Q Now, you also asked some questions of the respondents, the series of questions about the sources of their information on this case; is that right?

A Yes.

Q Were there any significant differences in the respondents from county to county when their source of information was the news media?

A I'm looking at a copy of the questionnaire. And there are no significant differences between Washington, Iron, and Salt Lake County. 94 percent, 96 percent, 97 percent, all said the news media was a source of information about the case.

Q Now, you also asked the question of the respondents whether or not they had learned about the case from a neighbor or friend. And that was question 13; is that right?

A Yes.

Q And was there a difference from county to county if the source of information was word of mouth, was rumor and hearsay, in other words?

A Yes. There's a difference. Washington County, the yes responses in Washington County were 30 percent. In Iron

County they were 15. And in Salt Lake County it was 12. These are the people who stated yes, that neighbors or friends were sources of information about the case.

Q Statistically, the difference between Washington County where the source of information for some of the respondents was a neighbor or a friend, where the answer in Washington County was the 30 percent had obtained information in that regard and 12 percent in the Salt Lake County, is an 18 percent difference. Is that a significant difference?

A There is a difference. There is a significant difference between the 12 and the 30 percent. Thirty and the 15 percent.

Q Are family and friends a reliable source of information?

A In my -- can they be a reliable source of information?

Q Um-hmm.

A They can be. They can also be not a reliable source of information. Those are difficult to say whether they are, you know, that -- I've got how the public perceives them. But not knowing what family, friends, neighbors say, it's tough to say. I don't know. They are not reliable like information from the court or direct information from the person.

Q What conclusion do you draw as an expert in the field

of survey analysis from the fact that 30 percent of the respondents had learned something about this case from a neighbor or friend in Washington County versus 12 percent in Salt Lake County?

A I think that it is being more discussed between people, between people in neighborhoods, people at work. That's what that information would tell me, that it's being discussed.

Q So, would that suggest to you, again, in your opinion, that Warren Jeffs is a bigger issue in Washington County than in Salt Lake County?

A Certainly, given that information it is, neighbors and friends are a much greater source of information.

THE COURT: Counsel, let me take that question and divide it out a little bit. Mr. Bugden's question was very broad. Warren Jeffs, as a subject of conversation --

THE WITNESS: Okay.

THE COURT: -- in your survey question, you are just asking about general information about the entire case, specifically this litigation; is that accurate?

THE WITNESS: Yes.

THE COURT: All right. So, the data that I have here in Court's Exhibit No. 1 is directly specific to this case, that was the purpose for your design of your study?

THE WITNESS: Yes.

THE COURT: And it was focused upon this particular institution of this lawsuit as opposed to Mr. Jeffs and whatever other standing he may have in the community? Is that accurate?

THE WITNESS: Yes. I think the question was, which of the following were sources of information about the case. And it came after two or three questions about the case. So, the focus at this point is down to the case level.

THE COURT: In your study, it does not appear as though you did anything to divide out, and the only thing I can think of is trying to comb hair balls out of a cat. But trying to take out some of the other issues and specifically parse it down to the litigation itself. I don't see in this study anything saying, are you separating your opinion about Mr. Jeffs from his position as a leader of the Hildale/Colorado City community versus a defendant in this criminal case? Because of the structure of the questions that we have and the general high publicity that this case has drawn about issues of the Colorado City/Hildale community, the religious practices of the residents of that community, the specific practice of polygamy within that community, I become somewhat concerned about people having smeared together all of those overall issues and having that process taint the results of your survey here done in 16 questions.

THE WITNESS: Um-hmm.

THE COURT: What design have you done, other than the precise words, which as a lawyer I rely on words, but what design do you have to avoid that smearing effect, as I have called it? And I'm sure that there is, within your profession, a much better term.

THE WITNESS: No. Smearing is a very good term. It actually is really a challenge for us. It's whether you present people that are responding on a survey to different, to something totally different than the public is exposed to and thus set them up for their responses. It's a challenge to write a questionnaire where you don't bias in the process, introduce a bias in there and make people -- make people feel like their opinion and their attitude is wrong, because now we are starting to focus in. In other words, if we started to question, if we took those people that said -- I'm trying to think of a good way to put this, a good example -- what we don't want to do, I guess, and what we are very, very careful to try not to do, is put words or thoughts into people's minds that they didn't already have.

THE COURT: You will never ask them the questions.

THE WITNESS: Exactly. So, to introduce things that they never knew or thought about before, and then turn around and say, well, now what's your opinion on this, it becomes difficult as a researcher because then you have exposed them

to something new and different. Right now, the public, however be it right or be it wrong, this is their opinion and whether it's based on -- hopefully, we try to focus on the given case. But a lot of external factors come into people's opinions. Sometimes it isn't always, even though our questions are focused on the case which Mr. Jeffs is being charged for, if opinion, other opinion about other things related things come into it, it's difficult for us to separate.

THE COURT: Let me give you a hypothetical question, because that's what lawyers do. If I have a jury member, a potential jury member seated in this case, and I'm asking them regarding Mr. Jeffs in specifics, I will ask them a question like this. I will say, do you have any knowledge of Mr. Jeffs and his religious beliefs and, specifically, his advocacy of the doctrine of polygamy? If they were to say, yes, I would then ask, does the fact that there may be a relationship between the doctrine of polygamy and Mr. Jeffs --

THE WITNESS: Um-hmm.

THE COURT: -- cause you to have any bias or prejudice in your review of the evidence in this case, becoming very, very specific to that issue. I would then ask, If you believe you may have any bias or prejudice, you understand that the court would instruct you that you must

not bring to this case any such bias or prejudice? And then, finally, Could you do that? Could you separate that out? From your standing as a researcher in this field, is there any way that your survey can give me any guidance as to how that process might play out on a large body of prospective jurors?

THE WITNESS: If we were to handle it in that way?

THE COURT: Right.

THE WITNESS: Um, in terms of jurors that sit in front of you, that might work. In terms of trying to conduct a large scale telephone survey, that is much more difficult. We always -- just the logistics, just the language and trying to keep things simple. Most of the public is not terribly, terribly comfortable with legal, you know, jargon, for lack of a better word, maybe. So, when we make calls, and when we try to measure public opinion, we try to put it at a level that they would understand. And if it gets too complex or too complicated, then we get misreads because of that. In terms of whether you could do it with a jury, you know, potential jury, and they were in front of you and you could take more time and go off -- you know, part of research is that the questions all have to be read the exact same way and be as simple for kind of the basic level of the public to understand. And so, with somebody sitting in front of you where you could have a little more dialogue, it might be